Filed 9/18/12 In re Alexis Z. CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ALEXIS Z., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. ALEXIS Z., Defendant and Appellant.	D059968 (Super. Ct. No. J229053)

APPEAL from a judgment of the Superior Court of San Diego County, Lawrence Kapiloff, Judge. (Retired Judge of the San Diego Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified.

The juvenile court declared Alexis Z. a ward (Welf. & Inst. Code, § 602) after sustaining allegations he committed assault by means of force likely to cause great bodily

injury (Pen. Code, § 245, subd. (a)(1)),[1] assault with a deadly weapon (§ 245, subd. (a)(1)); battery resulting in serious bodily injury (§ 243, subd. (d)); possession of metal knuckles (§ 12020, subd. (a)(1)) and misdemeanor battery (§ 242).[2]

The court found the maximum period of confinement to be seven years. The court placed Alexis on probation and committed him to the Short Term Offender Program for a period not to exceed 90 days.

Alexis appeals, contending the true finding on the misdemeanor battery count must be reversed because the crime is a lesser included offense of felony battery, and the true finding of assault with force likely to cause great bodily injury count must be reversed because it is duplicative of the true finding on the assault with a deadly weapon count. Alexis also contends the court violated his due process rights by questioning a defense witness.

FACTS

Alexis and Bryan G. attended the same high school.

After school on May 6, 2011, Alexis and Bryan went to the apartment complex where Alexis resides. Bryan used the restroom by the pool, and when he came out of the restroom, Alexis punched him in the face. Bryan fell down and other people began to hit and kick him. Someone "whipped" Bryan with a metal chain. The chain also was used to punch Bryan, who did not identify the chain wielder at trial. Bryan estimated 20

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1 All further statutory references are to the Penal Code unless otherwise specified.

2 In connection with the felony assault charges and the felony battery charge, the court sustained allegations of personal infliction of great bodily injury and personal use of a deadly weapon. (§§ 1192.7, subd. (c)(8) & (23), 12022.7, subd. (a).)

people attacked him, including Alexis and his brother. After the attack, Bryan ran to a nearby 7-Eleven convenience store, where the clerk called 911.

Escondido Police Officer Beverly Holtz responded to the call. She testified Bryan was bleeding from his nose and mouth area and had welts on his forehead that appeared to be caused by a chain. Bryan also had chain marks on his torso, back, arms and thigh. Bryan told Holtz that Alexis hit him with a chain.

Alexis told Holtz he pulled a chain that connected his wallet to the belt of his pants, wrapped the chain around his hand and punched Bryan. Alexis said he used the chain because Bryan had pulled out a knife and swung it towards him. Four other people who were at the scene, testified that Bryan pulled a knife on Alexis. Bryan denied owning a knife and testified he did not use any weapon while being attacked. A knife was later retrieved from the bottom of the pool.

DISCUSSION

I

Alexis contends the true finding that he violated section 242 by committing battery must be reversed because simple battery is a lesser included offense of battery with serious bodily injury. Alexis is correct, as the Attorney General concedes. (*People v. Ortega* (1998) 19 Cal.4th 686, 692-693, disapproved on another point in *People v. Reed* (2006) 38 Cal.4th 1224, 1228-1229, 1231.) We shall order the juvenile court to strike the true finding on the battery count.

II

Alexis contends the true finding on the assault with force likely to cause great bodily injury count must be reversed because it is duplicative of the true finding on the assault with a deadly weapon count. The contention is without merit.

Under section 954, "[a]n accusatory pleading may charge . . . different statements of the same offense" and "the defendant may be convicted of any number of the offenses charged."

Alexis is correct that section 245, subdivision (a)(1) defines only one crime. " 'The offense of assault by means of force likely to produce great bodily injury is not an offense separate from . . . the offense of assault with a deadly weapon.' " (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1036-1037, quoting *In re Mosley* (1970) 1 Cal.3d 913, 919, fn. 5.) A person can violate section 245, subdivision (a)(1) by committing an assault upon the person of another with a deadly weapon other than a firearm *or* by means of force likely to produce great bodily injury. (*Aguilar*, at p. 1028.) "[T]he statute focuses on *use* of a deadly weapon or instrument or, alternatively, on force *likely* to produce great bodily injury[;] whether the victim in fact suffers any harm is immaterial." (*Ibid*.) A " 'deadly weapon' " can be " 'any object . . . which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' " (*Id*. at pp. 1028-1029.)

Alexis, however, is mistaken in assuming he committed only one crime and the two counts are duplicative. Alexis assaulted Bryan with the chain twice—(1) by whipping Bryan with the chain, and (2) by punching Bryan with the chain wrapped

around his fist. Those were separate acts; it does not matter that they happened in the same fight. In *People v. Johnson* (2007) 150 Cal.App.4th 1467, the defendant was convicted of three counts of corporal injury on a cohabitant arising from a single incident in which he hit a woman with whom he was living on the nose, eyes and mouth; choked her and held her by her throat against the wall and struck her on the neck, arm, lower back and leg; and stabbed her in the left arm. (*Id*. at p. 1471.) The Court of Appeal rejected the defendant's claim that multiple convictions were improper under section 954 because his conduct constituted a single continuous assault, the appellate court found "the crime described by section 273.5 is complete upon the willful and direct application of physical force upon the victim, resulting in wound or injury. It follows that where multiple applications of physical force result in separate injuries, the perpetrator has completed multiple violations of section 273.5." (*Id*. at p. 1477.) As a result, the appellate court concluded the evidence supported three separate convictions for a violation of section 273.5 consisting of: one offense when defendant beat the victim; another when he held her by the throat; and a third when he stabbed her arm. (*Ibid*.) Similarly, here, under section 954, Alexis's charge and true finding of two counts of aggravated assault (one with a deadly weapon, and one with force likely to produce great bodily injury) are permissible.

The tension between section 954 and section 654, which prohibits multiple punishment for the same act or omission, is resolved at sentencing. "In general, a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. 'In California, a single act or course of conduct by a

defendant can lead to convictions "of *any number* of the offenses charged." ' " (*People v. Reed*, *supra*, 38 Cal.4th at p. 1226; see also §§ 654, 954.) Section 954 generally permits multiple convictions, although section 654 prohibits multiple punishments for the same act or omission. As our Supreme Court explained in *People v. Sloan* (2007) 42 Cal.4th 110, 116: " 'When section 954 permits multiple [convictions,] but section 654 prohibits multiple punishment, the trial court must stay execution of sentence on the convictions for which multiple punishment is prohibited. [Citations].' "

That is what the juvenile court did here. Although Alexis suffered two true findings for his separate acts, he was punished only once, as is permitted by section 654.

In the reply brief,[3] appellate counsel argues for the first time that if Alexis's act of whipping Bryan with the chain and his act of punching Bryan when the chain was wrapped around his fist were separate offenses, they were both assaults with a deadly weapon—that is, neither was an assault with force likely to cause great bodily injury and the true finding on that count must be reversed. Generally, a contention may not be raised for the first time in the reply brief. (*People v. Lewis* (2008) 43 Cal.4th 415, 536, fn. 30.) In any event, the contention lacks merit.

In *People v. Montes* (1999) 74 Cal.App.4th 1050, 1054, the appellate court held a jury was entitled to find a three-foot-long, " 'kind of thick' " chain, which was doubled over when swung at the victim constituted a deadly weapon. But that case is not

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3 Appellate counsel's reply brief is not in conformance with California Rules of Court, rule 8.40 (b), which requires the cover color of an appellant's reply brief be tan—not green.

dispositive. The record here does not contain similar details about the chain; all that is disclosed is Alexis used the chain to attach his wallet to his belt. It was up to the juvenile court, sitting as trier of fact, to decide whether the chain was used as a deadly weapon based on the nature of the chain, how it was used and other facts relevant to the issue. (*People v. Aguilar*, *supra*, 16 Cal.4th at p. 1029.) Further, the argument in the reply brief assumes there were two acts of aggravated assault. Since assault with a deadly weapon and assault with intent to cause great bodily injury are not separate crimes, but rather alternative means of violating section 245, subdivision (a)(1), the two true findings are proper.

In a supplemental brief, appellate counsel brings to our attention three other cases; none assists Alexis.

In *People v. Ryan* (2006) 138 Cal.App.4th 360, the defendant was convicted of two counts of forgery by signing another's name (§ 470, subd. (a)) and two counts of forgery by making or passing a forged check (§ 470, subd. (d)) after she signed another person's name on two checks and then used those checks to make purchases at two different stores. (*Id*. at pp. 362-364.) The Court of Appeal held that defendant could not be convicted of two counts of forgery based on signing her name to, and attempting to use, the same check, where both counts were based on different subdivisions of the same statute prohibiting forgery. (*Id*. at pp. 363-364, 368-369.) After an extensive review of the legislative history of the forgery statute (*id*. at pp. 364-368), the appellate court set forth a single instrument/single forgery rule: there can be only one section 470 forgery conviction per forged document, regardless of the number of acts committed to

accomplish the forgery. (*Id*. at pp. 367, 371). There is no comparable single fight/single assault rule. During the course of the fight Alexis committed two assaults—whipping Bryan with the chain and punching Bryan with the chain wrapped around his fist.

In *People v. Coyle* (2009) 178 Cal.App.4th 209 (*Coyle*), the appellate court held that a defendant who killed a single person could be convicted of only one count of murder rather than multiple counts, even though the single murder involved more than one special circumstance. (*Id*. at pp. 211, 217.) The Attorney General conceded this point and the only dispute was how to remedy the error. (*Id*. at p. 217.) The Court of Appeal ruled the judgment should be consolidated to reflect one count of murder with two special circumstances. (*Id*. at p. 218.) *Coyle*, in which there was only one act constituting murder, is inapposite. Here, there were two separate acts constituting assaults.

People v. Jefferson (1954) 123 Cal.App.2d 219, an assault case, has nothing to do with the propriety of multiple convictions. Rather, the case addresses the *continuous conduct* exception to the election rule that applies where the evidence reveals numerous crimes, any one of which could be the crime charged. (*Id*. at pp. 220-221.)

III

Alexis contends the juvenile court violated his right to due process by engaging in improper advocacy when it questioned a defense witness. The contention is without merit.

The defense witness was David M., the assistant principal of the high school, who was called to testify about victim Bryan's character and reputation for truthfulness and

violent tendencies. During direct examination, the assistant principal testified, among other things, he had disciplined Bryan with a five-day suspension in connection with this incident for engaging in a fight on the way home from school. The court interrupted the examination to inquire if Alexis had been disciplined by the school. The assistant principal replied he intended to discipline Alexis for the incident, but had not done so because Alexis had not yet returned to school.

After the prosecutor cross-examined the assistant principal, the court brought up the school discipline issue again. The assistant principal said he learned of the incident from talking with students who were present at the fight and from a telephone conversation with Bryan. At this point, the court showed the assistant principal photographs of Bryan's injuries, which were exhibits, and the following colloquy took place:

"THE COURT: Looks like he was pretty well beat up, wasn't he?

"THE WITNESS: Yes.

"THE COURT: Did your witnesses tell you that?

"THE WITNESS: Yeah, actually they did, said there was quite a bit of blood.

"THE COURT: This is alleged to be and was testified to as Bryan's leg.

"THE WITNESS: Okay.

"THE COURT: Do you see the marks on there?

"THE WITNESS: Yes, sir.

"THE COURT: This is his arm.

"THE WITNESS: Okay.

"THE COURT: This is his side. His back.

"[¶] . . . [¶]

"THE WITNESS: Okay.

"THE COURT: So would you agree from these photographs that he's pretty well beat up?

"THE WITNESS: Absolutely.

"THE COURT: I see. Now would that indicate that -- well, let me put that aside. You talked to him [Bryan] about the fight?

"THE WITNESS: That's correct.

"THE COURT: I see. And he told you his version of it?

"THE WITNESS: That's correct.

"THE COURT: I see. All right. That's it. Thank you."

The court allowed Alexis's counsel to ask follow-up questions, but sustained the prosecutor's objection to questions about the assistant principal's opinion of what happened at the fight.

This was followed by another colloquy:

"[DEFENSE COUNSEL]: Your Honor, the Court asked about his investigation and if he spoke to witnesses, so I'd like to know if he -- obviously disciplined Bryan. I would like to know if he knew what happened based on what he heard.

"THE COURT: He couldn't know what happened. He was told what happened and he came to some conclusions about what happened.

"[DEFENSE COUNSEL]: Right. I would like to know what those conclusions were, your Honor. That's what I'm asking.

"[¶] . . . [¶]

"THE COURT: His conclusions are not relevant to this case. He's not the judge. I am.

"[DEFENSE COUNSEL]: I understand.

"THE COURT: So this is why I asked -- showed him these things. And I guess I should have followed up by saying: Would you -- in terms of what you were told about the fight and in terms now of observing what occurred, would this in any way change your position about what happened at that fight?

"THE WITNESS: It would -- based on the information you just provided to me, it would affect my disciplining Alex, not so much Bryan. He would still receive the five-day suspension.

"THE COURT: So in other words, until you saw these photographs, you didn't know what the extent of his injuries were; is that correct?

"THE WITNESS: That's correct.

"THE COURT: Thank you. Anything else?

"[DEFENSE COUNSEL]: There's a lot of questions I want to ask, your Honor. I just don't want to get the ire of the Court up.

"THE COURT: Counsel, ask your question and there will be an objection or not, and I'll sustain it if there's an objection and it's irrelevant.

"[DEFENSE COUNSEL]: Because the Court asked, I'll ask about your opinion as to what happened and what was your opinion as to what happened?

"THE COURT: His opinion is not --

"[DEFENSE COUNSEL]: But, your Honor, you asked if being shown the photos would change his opinion.

"THE COURT: I asked him, yes, it was his opinion as to the discipline of Bryan. That's all I'm concerned with about, the discipline, because he seemed to be disciplining these people unequal. That's all.

"[DEFENSE COUNSEL]: Okay. That's fine, your Honor. I was more concerned with the Court asking what his opinion of what happened was by showing those photographs.

"THE COURT: No. Just observing what happened. He hadn't taken these photographs into account. And he indicated that if he [had] taken those into account, it apparently would have somewhat altered his opinion as to what happened."

At this point, defense counsel was allowed to question the assistant principal further.

The next day of the trial, defense counsel made a motion for a mistrial "[b]ased on the evidentiary rulings on Friday and the cross-examination of the . . . defense witness by the Court showing the photographs to that witness, who was not present [at the fight], and . . . the demeanor of the Court on Friday . . . ." The court denied the mistrial motion.

We first note that Alexis's counsel did not object at trial to these allegedly improper actions in a timely fashion, and therefore has not preserved the issue of judicial

misconduct for appeal. (*People v. Raviart* (2001) 93 Cal.App.4th 258, 269.) "To obtain appellate review of claimed prejudicial 'cross-examination' by the trial court, appellants must have timely and specifically objected to that examination." (*People v. Camacho* (1993) 19 Cal.App.4th 1737, 1745.) The objection must be made "when the questioning occurred." (*People v. Corrigan* (1957) 48 Cal.2d 551, 556.) Further, counsel's mistrial motion on the next court day was not a timely objection.[4] Nevertheless, we have reviewed the complained-of actions by the court and conclude they did not constitute misconduct and were not prejudicial to Alexis.

A trial judge has a duty to control trial proceedings so that the evidence is fully developed, ambiguities and conflicts are resolved as far as possible, and the truth may be effectively ascertained. (*People v. Carlucci* (1979) 23 Cal.3d 249, 255; see also § 1044.) In the discharge of this duty, a trial judge may, among other things, examine witnesses to elicit or clarify testimony. (*People v. Rigney* (1961) 55 Cal.2d 236, 241; Evid. Code, § 775.)

"The power of a trial judge to question witnesses applies to cases tried to the court as well as to a jury." (*People v. Carlucci, supra,* 23 Cal.3d at p. 255.) "[I]t is not merely the right but the duty of a trial judge to see that the evidence is fully developed before the trier of fact and to assure that ambiguities and conflicts in the evidence are resolved insofar as possible." (*Ibid*.) " ' "[I]f a judge desires to be further informed on certain

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4 We disagree with appellate counsel's implicit argument in the reply brief that trial counsel moved for a mistrial at the earliest opportunity: "Immediately after [the assistant principal] was excused, the court recessed for the day." There was ample time for trial counsel to move for a mistrial before the court recessed for the day.

points mentioned in the testimony it is entirely proper for him to ask proper questions for the purpose of developing all the facts in regard to them." ' " (*People v. Raviart*, *supra*, 93 Cal.App.4th at p. 270.) The trial court is given " ' "[c]onsiderable latitude" ' " in questioning witnesses. (*Ibid*.)

In a bench trial, there is no risk that a jury may infer from the judge's questions that the judge is commenting adversely on defense witnesses' credibility. Therefore, a trial judge need not exercise the same degree of caution in phrasing questions in a court trial as is necessary in a jury trial. (See Cal. Judges Benchbook: Civil Proceedings—Trial (CJER 2d ed. 2010) § 8.60, p. 440.)

Of course, in questioning witnesses, the trial court must remain scrupulously fair; it may not disparage or discredit one party and ally itself with another. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1233, 1237-1238; *People v. Sanders* (1995) 11 Cal.4th 475, 531.)

Alexis argues that juvenile court assumed the role of prosecutor. We disagree. A judge does not become an advocate merely by asking questions. (*People v. Raviart, supra*, 93 Cal.App.4th at p. 272.) " 'The duty of a trial judge, particularly in criminal cases, is more than that of an umpire; and though his power to examine the witnesses should be exercised with discretion and in such a way as not to prejudice the rights of the prosecution or the accused, still he [or she] is not compelled to sit quietly by and see one wrongfully acquitted or unjustly punished when a few questions asked from the bench might elicit the truth.' " (*Ibid.*; *People v. Camacho*, *supra*, 19 Cal.App.4th at p. 1746.)

The juvenile court here did not assume the role of the prosecutor, create the impressions it was allying itself with the prosecution or otherwise deprive Alexis of a fair trial in a fair tribunal. (*People v. Harris* (2005) 37 Cal.4th 310, 346-347.) The school discipline issue was at most tangential to the prosecution's case against Alexis. The court's questioning was neither disparaging to the witness nor prejudicial to Alexis. Further, after the court completed its questioning, it gave both counsel an opportunity to ask the witness additional questions. Thus, through its involvement in the questioning of witnesses, the trial court simply fulfilled its duty, in a fair and impartial way, to see that the facts were presented clearly and fully so as to elicit the truth. (See § 1044; *People v. Carlucci*, *supra*, 23 Cal.3d at p. 255; *People v. Raviart*, *supra*, 93 Cal.App.4th at p. 272.)

On appeal, " '[o]ur role . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.' " (*People v. Snow* (2003) 30 Cal.4th 43, 78, quoting *U.S. v. Pisani* (2d Cir. 1985) 773 F.2d 397, 402.) "[T]he misconduct of a trial judge which will warrant a reversal of the judgment should be so definite and apparent as to leave little doubt that it has resulted in depriving the accused of a fair and impartial trial." (*People v. Browning* (1933) 132 Cal.App. 136, 153; accord, *People v. Kendrick* (1961) 56 Cal.2d 71, 92.) We find no such misconduct by the juvenile court here.

Assuming, arguendo that the questions were improper, the alleged misconduct was harmless under any standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24;

People v. Cudjo (1993) 6 Cal.4th 585, 610-612.) The evidence was overwhelming. Alexis admitted he hit Bryan with the chain. The assistant principal's testimony about Bryan's character and reputation for truthfulness and violent tendencies was not undermined by the peripheral issue of school discipline associated with this incident. Other witnesses testified that Bryan was dishonest and violent.

DISPOSITION

The judgment is modified by striking the true finding of battery (§ 242; count 5). As so modified, the judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

MCDONALD, J.